IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2006-0158
	DEPARTMENT A
GLORIA C. GUTIERREZ,	
	MEMORANDUM DECISION
Petitioner/Appellee,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
ANTONIO GUTIERREZ VEGA,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D 20051598

Honorable Jan E. Kearney, Judge

AFFIRMED

Law Office of Gilda M. Terrazas
By Gilda M. Terrazas
Tucson
Attorney for Petitioner/Appellee

Law Offices of Mark L. Williams
By Mark L. Williams
Nogales
Attorney for Respondent/Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Antonio Gutierrez Vega challenges the trial court's denial of his motion to set aside a default judgment in favor of appellee Gloria Gutierrez, dissolving the parties' marriage and dividing their assets. Finding Antonio waived any challenge to the sufficiency of process, and finding no abuse of discretion in the court's refusal to set aside the default judgment, we affirm.

¶2 In September 2005, Gloria filed an amended petition for dissolution of her marriage to Antonio. Antonio did not respond, and in November 2005 the clerk of the superior court entered default. In May 2006, the trial court approved a dissolution decree. In June 2006, Antonio moved to set aside the judgment pursuant to Rule 85(C), Ariz. R. Fam. Law P., 17B A.R.S., arguing there was mistake, inadvertence, surprise, or excusable neglect on Antonio's part, and mistake and perhaps fraud on Gloria's part. After a hearing, the trial court denied Antonio's motion. This appeal followed.

¶3 Antonio first argues that, at the hearing on his motion to set aside the judgment, the trial court improperly admitted into evidence the return of service affidavit for the amended petition for dissolution because there was no foundation and the document included hearsay. He contends that without the affidavit, there was insufficient evidence to prove he was properly served, and thus the judgment was void for lack of personal jurisdiction.

¶4 But although Antonio objected to the admission of the affidavit at the hearing, he did not move to set aside the judgment on the ground that it was void, nor did he argue

at the hearing that the judgment was void for insufficiency of process. Accordingly, he has waived this issue and we will not address it. *See Begay v. Roberts*, 167 Ariz. 375, 382, 807 P.2d 1111, 1118 (App. 1990) (court of appeals does not consider issues raised for the first time on appeal); *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996) (personal jurisdiction challenge to default judgment forfeited if not asserted in motion to vacate default judgment).

¶5 Antonio next argues the trial court erred by denying his motion to set aside the judgment because there was a mistake on Gloria's part and mistake or excusable neglect on Antonio's part. "Although 'it is a highly desirable legal objective that cases be decided on their merits,' we review the trial court's refusal to set aside a default judgment only for 'a clear abuse of discretion.'" *Hilgeman v. Am. Mortg. Secs., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033 (App. 2000), *quoting Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983). We defer to the trial court on "'disputed questions of fact or credibility.'" *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992), *quoting City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985).

¶6 In order to prevail on a motion to set aside a default judgment, the moving party must establish that it promptly sought relief from the judgment, its failure to answer was based on mistake or excusable neglect, and it had a meritorious defense. *See United*

Imps. & Exps., Inc. v. Superior Court, 134 Ariz. 43, 45, 653 P.2d 691, 693 (1982).[1] "The standard to be met in setting aside a default judgment, for mistake, inadvertence, surprise or excusable neglect, is whether the conduct causing the default might be the act of a reasonably prudent person under the same circumstances." *Ramada Inns, Inc. v. Lane & Bird Adver., Inc.*, 102 Ariz. 127, 129, 426 P.2d 395, 397 (1967). "Trial judges are in a much better position to make this determination than appellate judges." *Goglia v. Bodnar*, 156 Ariz. 12, 20, 749 P.2d 921, 929 (App. 1987).

¶7 Antonio contends that the mistake on Gloria's part was that the notice of default did not include an address for service of the notice on Antonio. Gloria testified she mailed the notice to Antonio and later saw it in his hands. As Antonio notes, Gloria appears to have contradicted herself, testifying that she both gave the document to him and mailed it to him. But the trial court found that Gloria had mailed the notice to Antonio, and we defer to that finding. *See Gen. Elec. Capital Corp.*, 172 Ariz. at 188, 836 P.2d at 401; *Parkinson v. Farmer's Ins. Co.*, 122 Ariz. 343, 345, 594 P.2d 1039, 1041 (App. 1979) (trial court resolves conflicts in testimony).

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[1]*United Imports & Exports*, and the other cases the parties cite interpret Rule 60(c), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, whereas this case involves Rule 85(C), Ariz. R. Fam. Law P., 17B A.R.S. But Rule 85, Ariz. R. Fam. Law P., is based on Rule 60, Ariz. R. Civ. P. Ariz. R. Fam. Law P. 85 committee cmt. And the language of the relevant provisions is identical. Accordingly, as the parties appear to agree, the cases interpreting Rule 60(c), Ariz. R. Civ. P., apply here.

¶8 Antonio further contends his neglect was excusable because of his age, his limited education, and his limited comprehension of English. But the trial court found that Antonio received both the petition for dissolution of marriage and the notice of default and was aware he had an obligation to respond. Antonio testified at the hearing that he had understood Gloria had initiated a dissolution proceeding and he had received papers relevant to the case three times. He testified that he had taken the papers to a friend, Martha Miranda, for translation, and Miranda testified that she had translated papers for Antonio.

¶9 The court found Antonio's conduct did not constitute excusable neglect "or any other factor that is recognizable under Rules 83 and 85[, Ariz. R. Fam. Law P.]" The evidence supports the court's findings, and we defer to them. *See Gen. Elec. Capital Corp.*, 172 Ariz. at 188, 836 P.2d at 401; *see also Daou v. Harris*, 139 Ariz. 353, 360, 678 P.2d 934, 941 (1984) (refusal to set aside default judgment not abuse of discretion where defaulting party "personally knew of the suit, and apparently merely neglected to act accordingly").

¶10 Finally, Antonio argues his failure to place the papers in a secure location and failure to secure a mailbox to which Gloria did not have access constitute mistakes under Rule 85(C). But again, the trial court found that Antonio had actual knowledge of the pending action and later default, that he knew he needed to respond, and that he failed to do so. The record supports those findings. Accordingly, the court did not abuse its discretion by finding that no mistake justified setting aside the decree.

¶11 We conclude the trial court did not abuse its discretion by determining that Antonio's delay was not excusable and the alleged mistakes did not justify setting aside the decree. Because of this conclusion, we need not address Antonio's arguments that he promptly sought to set aside the decree and had a meritorious defense.

¶12 For the foregoing reasons, the trial court's denial of Antonio's motion to set aside the default decree is affirmed.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge